STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Werner Beermann,

Petitioner,

v.

MTT Docket Nos. 410958 and 432263 (Consolidated)

Michigan Department of Treasury,

Tribunal Judge Presiding
Paul V. McCord

-and-

Peter Eggers,

Petitioner,

v.

MTT Docket Nos. 414399 and 435086 (Consolidated)

Michigan Department of Treasury,

Tribunal Judge Presiding
Paul V. McCord

Respondent.
_____/

FINAL OPINION AND JUDGMENT

Robert E. Forrest (P32733), for Petitioner, Werner Beermann
E. David Brockman (P1122), for Petitioner, Peter Eggers
Daniel E. Sonneveldt (P58222), for Respondent

## I. INTRODUCTION

These are consolidated appeals of an officer liability assessment. Petitioners Werner Beermann and Peter Eggers were both corporate officers of Goertz+Schiele, USA ("G+S"), a United States subsidiary of a German manufacturing conglomerate, located in Auburn Hills, Michigan. Respondent determined a deficiency in single business tax for the taxable periods 2006 and 2007 and in sales and use taxes for the taxable periods 2003 through 2008. These tax deficiencies were never paid and in 2009, G+S filed for bankruptcy and ultimately its assets were sold to another manufacturing concern. Following an audit or investigation, Respondent concluded Petitioners Beermann and Eggers were individually responsible officers of G+S under MCL 205.27a(5) for the approximate amount of $602,920 in corporate tax deficiencies. Petitioners do not dispute that they were corporate officers of G+S during the tax periods at issue, but instead assert, individually, that they were not "responsible" officers within the meaning of MCL 205.27a(5) as

each lacked specific authority over G+S's tax affairs and neither had any control over the process in which G+S selected which of its creditors for payment or disbursement of funds. On this basis, Petitioner Beermann and Petitioner Eggers each contend that they cannot be held personally liable for G+S' taxes.

Given the commonality of underlying facts, evidence, witness testimony and law, we consolidated these two cases for hearing and judgment. Following an evidentiary hearing held on November 14, 2012, in Dimondale, Michigan, we are asked to decide two questions: (1) whether Petitioner Werner Beermann is a responsible officer of G+S for each of the two assessments levied against him; we hold that he is not, and (2) whether Petitioner Peter Eggers is a responsible officer of G+S for each of the two assessments levied against him; he is not.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing and observing the witnesses who testified at the evidentiary hearing, allowing for the Tribunal to assess credibility, and having further considered the exhibits submitted by the parties, the arguments presented by counsel and applying the governing legal principles, the Tribunal makes the following independent findings of fact and conclusions of law[1] set forth below in memorandum form. See MCL 205.751(1) ("A decision and opinion of the tribunal . . . shall be in writing or stated in the record, and shall include a concise statement of facts and conclusions of law, stated separately . . ."); see also MCL 24.285.

## III. FINDINGS OF FACT

This section presents a "concise, separate, statement of facts" within the meaning of MCL 205.751(1), and, unless stated otherwise, the matters stated or summarized are "findings of fact" within the meaning of MCL 24.285. The findings of fact are set forth in narrative form based on the Tribunal's conclusion that it is the most expeditious manner of proceeding where there are few disputes about facts and the main focus of the controversy are the legal issues.

### *1. Background*

Goertz+Schiele Corporation ("G+S") was incorporated in the State of Michigan in November of 1999 as a wholly-owned subsidiary of Goertz+Schiele KG, a German-based company engaged in engineering, manufacturing and marketing of automotive powertrain parts and components. G+S manufactured engine blocks for Mercedes, Harley, Chrysler, and GM, and the like, at a facility in Auburn Hills, Michigan. At all times relevant to this appeal, both the German parent and American subsidiary were privately held companies. The Board of Directors was comprised of Roland Schiele, Wolfgang Speck, and Thilo Zimmerman. Mr. Schiele was the principal shareholder and Chief Executive Officer, and Mr. Speck served as Chief Financial Officer of both entities. Mr. Zimmermann was less involved in the companies' day-to-day operations, and

[1] To the extent that a finding of fact is more properly a conclusion of law, and to the extent that a conclusion of law is more properly a finding of fact, it should be so construed.

"tended to provide advice or guidance . . . on certain things, mostly in the area of acquisitions, strategies." TR, p. 122.

G+S hired Arne Kramer, initially, as an affiliate controller for its St. Ingbert location, but was transferred to Auburn Hills in February of 2007. Organizationally, as G+S's corporate comptroller, Mr. Kramer worked under Peter Eggers, and subsequently Werner Beermann, for the Auburn Hills location, but he reported directly to Germany for all financial matters. Specifically, Mr. Kramer reported to Peter Nomine, who was the German group controller and to Mr. Koenig, who was the German head of accounting. Mr. Nomine and Mr. Koenig in turn reported to Mr. Speck. Following Mr. Kramer's resignation in March of 2009, Sheri Briskey assumed the role of comptroller.

*2. G+S's Officers*

Through the years, other officers have included Alexander Bruggner, Christian Rueckerl and Peter Loetzner.

*a. Peter Eggers*

Goertz+Schiele KG hired Peter Eggers in 1999 to be project manager for the Auburn Hills set up. Duties included site selection, facility design/development, installation of manufacturing equipment, and population of the plant. "So I had recruited personnel, installed the manufacturing systems and got them up and running." TR, pp. 110-111. After completion of the facility, Mr. Eggers moved into a general manger role at the Auburn Hills location. He moved to Canada in 2004, but retained his employment with G+S remotely as Director of Business Development. At all times, Mr. Eggers held the title of both Secretary and Treasurer, and reported directly to Mr. Schiele.

Peter Eggers is identified as an officer in numerous corporate documents, including G+S's Form 1120 U.S. Corporation Income Tax Returns for the 2004, 2005, 2006 and 2007 tax years, the November 30, 1999 and August 22, 2001 Registration for Michigan Taxes, both of which were signed by him in his capacity as Secretary and Treasurer. Mr. Eggers is also identified as Secretary and Treasurer in all of the Corporation Information updates filed with the Michigan Department of Labor and Economic Growth between 2001 and 2009, and the 1999 Notice of No SBT Return Required and 2001, 2002, 2006 and 2007 SBT Returns were all signed by him in that capacity. Other documents bearing his signature include a federal Application for Automatic Extension of Time to File Corporate Income Tax Return for 2002, a Power of Attorney appointing C&M as G+S's representative to the state for tax, benefit or debt matters, signed February 6, 2008, a second Power of Attorney appointing David Brockman as its representative to the state for tax, benefit or debt matters, signed March 11, 2011, and a Payroll Service Provider Combined Power of Attorney Authorization Form and Corporate Officer Liability Certificate for Business, appointing ADP as its authorized representative for income tax withholding matters, signed October 18, 2000. Mr. Eggers acknowledged his status as a corporate officer, and that he continued to serve in that capacity even after moving to Canada and assuming the role of Director of Business Development. TR, pp.113, 118-119.

As Director of Business Development, Mr. Egger's duties consisted primarily of customer relations, *i.e.*, "calling on customers, making proposals and presentations, and basically trying to obtain further business for the organization in Auburn Hills." TR, p. 112. Secretarial duties included minute-keeping, and he would also, as directed by Mr. Schiele, execute certain corporate documents, including the aforementioned. In that regard, Mr. Eggers testified: "I was put there, I was . . . a local officer to be a conduit for the parent company, so it was my job to carry out those instructions." TR, p. 127. As Treasurer, Mr. Eggers had knowledge of the company's finances. He regularly reviewed profit and loss statements and looked at statistics relating to those statements in the context of operational management and cost control. Mr. Eggers testified, however, that while he had knowledge of financial operations, he did not get involved in or have any tax-specific duties.

*b. Werner Beermann*

Werner Beermann joined G+S in 2004. He was initially hired to act as a general manger and based upon previous experience, believed that his duties would consist primarily of "run[ning] the operation, as in production, engineering. That's my background . . . . I would oversee the operations, would see to it that it runs lean and efficient, ship good quality products, make sure that the employees are treated fairly, and use my knowledge of German engineering—you know, transferring German technology into a U.S. company. That's what I had done before." TR, p. 106. Ultimately, however, he was given the title of Vice President of Sales and Finance, a title that he held until August 28, 2009, when he assumed the role of President. Like Mr. Eggers, Mr. Beermann reported directly to Mr. Schiele.

Like Mr. Eggers, Werner Beermann is listed as an officer on G+S's Forms 1120, *U.S. Corporation Income Tax Return,* for the 2004, 2005, 2006 and 2007 tax years. Unlike Mr. Eggers, however, Mr. Beermann's signature appears on very few corporate documents or communications. His signature appears only on the January 16, 2009, communication to Treasury regarding G+S's 2007 SBT Annual Return and corresponding liability, the July 15, 2009, Installment Agreement for Final Assessment R057083 and the August 28, 2009, Certificate of Change of Resident Agent. Though he acknowledged his status as a corporate officer, Mr. Beermann testified that despite his title, he never had any financial duties, and that prior to becoming President, his duties consisted primarily of sales and customer relations. TR, p. 90.

*3. G+S's Tax Return Preparation & Representation*

G+S retained an outside accounting firm, Southfield-based Clayton & McKervey ("C&M"), to handle the preparation of all its annual federal and state filings. Peter Eggers, and subsequently Werner Beermann, were responsible for the signing of C&M engagement letters, but all other duties associated with preparation of the filings were delegated to the local corporate controller, Arnie Kramer, and he was C&M's primary contact throughout his tenure with G+S. McKervey Dep, p. 17. Returns were prepared utilizing data downloaded by Mr. Kramer from the company's SAP system, which was maintained on German servers and controlled by the St.

Ingbert Accounting Department. Mr. Kramer testified that he forwarded all C&M communications to Germany, specifically to Mr. Speck, Mr. Schiele, Mr. Nomine and Mr. Koenig, and Kevin H. McKervey of C&M observed that"[g]enerally, when we were providing information to them or discussing things with them, there was a—there was often, I guess, an indication that any recommendations, any thoughts that we had, would have to be reviewed with the . . . management in Germany." McKervey Dep, p. 14. G+S's federal corporate income tax returns were filed by C&M electronically, pursuant to a Form 8879-C signed by Mr. Schiele. Finalized state returns, including the 2006 and 2007 SBT returns underlying Final Assessment R057083, were delivered to Mr. Kramer, who forwarded them to Germany for approval before presenting them to Mr. Eggers for his signature. When requested by Mr. Eggers, German approval was verified through email hardcopies.

The 2006 SBT return was signed by Kevin McKervey on October 17, 2007, and by Peter Eggers on December 15, 2007. In September 2007, C&M sent a letter to Mr. Schiele, advising him of G+S's estimated 2007 SBT Liability. Mr. McKervey explained: "We wanted to make sure that they knew that there was projected to be a significant tax liability for the year ending 2007 since their tax liability was going to be much greater than what it had ever been in the past." McKervey Dep, p. 22. As to why the letter was specifically sent to the attention of Mr. Schiele, as opposed to Mr. Kramer or any of the other local representatives of G+S, Mr. McKervey indicated that "[i]t was always our impression that Mr. Schiele controlled the cash flow of the related corporations. And we knew that at this level of payment, we didn't want there to be any surprise by what we understood to be the top individual in all components." McKervey Dep, pp. 22-23. The 2007 SBT return was signed by Kevin H. McKervey on January 13, 2009, and by Peter Eggers on January 16, 2009.

C&M also represented G+S in the Department's sales and use tax audit for the period January 1, 2003, through December 31, 2008, which resulted in the issuance of Final Assessment R120396 against both Mr. Beermann and Mr. Eggers. Mr. Kramer, and subsequently his successor, remained C&M's primary contacts during this time: "[W]e kept advising Arne Kramer, and then the person who succeeded him, a lady, that we needed to provide this information to the state so that they could complete their audit and those documents were never provided so that . . . the audit could be completed. And the agent felt that she had no choice but to assess tax at that point in time." McKervey Dep, p. 28.

*4. G+S's Bank Account's*

Roland Schiele and Wolfgang Speck had signatory authority on the bank accounts, as did all of the corporate officers in the Auburn Hills location, including Werner Beermann and Peter Eggers. Arnie Kramer testified, however, that the individuals in Germany exercised 100% control over G+S's actions with respect to those accounts. Mr. Kramer compiled lists of accounts payable on a weekly basis, and with input from Mr. Beermann, Mr. Eggers, and Mr. Loetzner, would provide prioritized payment proposals, but could not independently pay any invoices without German authority. TR, pp. 29, 49, 55, 92. This included the taxes owed to the State of Michigan. "They decided who we would pay and they would say, 'pay those vendors,' or 'we need money,' you know. We had to wire often amounts to parent company. They

wouldn't allow us to pay $200,000 in taxes at this point in time." TR, pp. 42, 49-50. Mr. Beermann confirmed that while he did have check-signing authority, he had no discretion as to what checks would be signed. "The list that Arne Kramer described was approved by our German head office, and I was—or we were given stacks of pre-printed checks with a list that showed approvals and we were to sign those." TR, pp. 72-73, 82. In further explanation, Mr. Beermann indicated that "[t]his was basically a list of companies and the amount due, and from our side some recommendation of what we, you know, would see urgent. And it was all sent to Germany, and that came back changed to whatever, you know, Germany felt needed to be paid." TR, p. 98.

Similarly, while Mr. Kramer supervised the payroll, and the payroll accountant reported to him, "once that was prepared, we also had to send the amount to Germany and get the approval to pay it out." TR, p. 30. Mr. Kramer testified that there were occasions when the materials that were prepared were rejected by Mr. Schiele, who took a personal interest in G+S's payroll function. Regarding the payroll issues, Mr. Beermann testified "Well, you know, the only statement I can make is that . . . because we didn't have any payroll approval . . . Arne Kramer and I went to our own accounts and twice paid payroll because he didn't approve it." TR, p. 79. Mr. Eggers indicated that the regularity in which payroll was withheld was far too routine to be acceptable: "It happened frequently. It often . . . happened at a time where Mr. Schiele was either having some bad cash situations in Germany or things weren't working as smoothly in Auburn Hills as he . . . was hoping. And so he would—well, basically he would lash out like that and say, no, payroll is not approved until something else takes place. And quite frequently the only way where we would be able to get it freed for the general plant population is if Mr. Beermann, Mr. Kramer, myself, Peter Loetzner while he was still there, said, look it, you know, just release the payroll but hold ours until whatever condition he had imposed was satisfied. So we did whatever we could even to the point where Mr. Beermann and Mr. Kramer shored up the bank account such that—from their own personal assets such that it could be paid." TR, p. 126

Mr. Schiele also made frequent demands for money transfers. Mr. Kramer testified that one example occurred in November of 2008: "I transferred to the parent company $110,000 that we had—or that we could make available for this wire transfer. And then in my—that was in an e-mail to the bank to instruct them. And then I explained to Mr. Schiele that this wire transfer was the maximum, so to say, that we could do because otherwise certain payments that I list to HAP and GAMCO would—the checks would bounce if we were to pay more to the parent company . . . . He told me, 'for the last time,' because he had said that before on the phone, wire us $150,000 or I will turn your lights off,' meaning he could end our operations or—it's a threat." TR, p. 32. A similar demand was made upon Mr. Loetzner in November of 2006, and Mr. Beermann testified that this was something that he observed frequently during his tenure with G+S, particularly in 2008 and 2009. TR, p. 33, 81. Mr. Beermann also testified that the parent company's 2008 bankruptcy filing did not change this dynamic: "I tried to contact [the bankruptcy trustee] many times because Mr. Schiele went to our account and took out—I don't know the exact amount. I think it was several hundred thousand dollars. I came in the morning and he had taken it out. And then I basically told [the trustee], I said, you—this can't go on like this. And then shortly—a week later I had the resignation of Mr. Schiele." TR, p. 81.

*5. G+S Financial Stress and Bankruptcy*

Due to the situation in Germany, Mr. Kramer drafted a letter to the Michigan Department of Treasury in an effort to get an extension for payment. He explained: "[B]ecause [Germany] didn't allow us before to pay taxes, so we tried to still maybe make arrangements with the authorities or—it was—I'm pretty sure it was—came out of a discussion with them, what can you do in order to postpone tax payments." TR, pp. 41-42. He forwarded the letter to Peter Eggers for review, who indicated that "in the context of cash management, at that time we were dealing with many different companies in terms of payables, liabilities and such. The State of Michigan was always included in that. And we had been instructed to try to come up with payment plans with our creditors, and ultimately they also had suggested that we approach the State of Michigan to see if we could set up something similar with them. And based on that Arne created the initial draft of that letter." TR, p. 125. The draft was reviewed by the head office, and there was approval to send it. According to Mr. Beermann, who along with Mr. Eggers, co-signed the document on January 16, 2009, "we simply—I mean, we felt we needed to make a statement that we have no money to pay it and try to find ways to see what we could do." TR, p. 88.

On June 11, 2009, Treasury responded to the January 16, 2009 communication. It requested financial information and submission of the enclosed installment agreement. Sheri Briskey completed the Agreement on behalf of the corporation and Mr. Beermann signed it on July 15, 2009. Mr. Beermann indicated that the corporation had a negative cash flow of $369,302 at that point in time, and as such, did not have any realistic ability to make any payments. TR, p. 84. Regarding the circumstances in which he was presented with the installment agreement, Mr. Beermann testified: "Well, if I recall correctly, it was basically a statement of, you know, us saying this is the status of the company. You know, with—Sheri Briskey, if I recall correctly, was the one that came and she said we have to get this somehow out there, you know. And then I asked, you know, is it a –why is my Social Security number on there. And, well, she said that, you know, we have to do this, okay. So I signed it." TR, p. 107.

As the financial crisis that was consuming the company worsened, Mr. Beermann's position changed. "I was the only officer left in the corporation, and in talking to our bankruptcy lawyer he recommended that, you know, I talk to our counsel, who was Chris Allen, and . . . have this filed to become President of the company so I could proceed in the bankruptcy case, because there was nobody left. Schiele was fired, kicked out by the bankruptcy guy in Germany, and so I was the only one left." TR, p. 85. Mr. Beermann assumed the title of President on August 28, 2009, and filed a Change of Resident Agent with the Michigan Department of Labor and Economic Growth as President the same day. He filed the petition for bankruptcy on September 11, 2009.

*6. Responsible Officer Assessments*

On or about December 13, 2010, Respondent issued a Final Bill for Taxes Due (Final Assessment) to Petitioner Werner Beermann as a responsible officer of G+S pursuant to MCL 205.27a(5). The assessment consisted of the following:

| Assessment No. | Period | Tax | Penalty | Interest* | Total* |
|---|---|---|---|---|---|
| R057083 | 2006-2007 | $308,646.83 | $73,913.00 | $44,768.18 | $427,328.01 |

On or about March 20, 2012, Respondent issued a Final Bill for Taxes Due (Final Assessment) to Petitioner Werner Beermann as a responsible officer of G+S pursuant to MCL 205.27a(5). The assessment consisted of the following:

| Assessment No. | Period | Tax | Penalty | Interest* | Total* |
|---|---|---|---|---|---|
| R120396 | 2003-2008 | $124,515.00 | $0.00 | $51,075.37 | $175,590.37 |

On or about April 7, 2011, Respondent issued a Final Bill for Taxes Due (Final Assessment) to Petitioner Peter Eggers as a responsible officer of G+S pursuant to MCL 205.27a(5). The assessment consisted of the following:

| Assessment No. | Period | Tax | Penalty | Interest* | Total* |
|---|---|---|---|---|---|
| R057083 | 2006-2007 | $308,646.83 | $73,913.00 | $48,002.63 | $430,562.46 |

On or about November 8, 2011, Respondent issued a Final Bill for Taxes Due (Final Assessment) to Petitioner Peter Eggers as a responsible officer of G+S pursuant to MCL 205.27a(5). The assessment consisted of the following:

| Assessment No. | Period | Tax | Penalty | Interest* | Total* |
|---|---|---|---|---|---|
| R120396 | 2003-2008 | $124,515.00 | $0 | $48,874.00 | $173,389.00 |

* Interest accruing and to be computed in accordance with sections 23 and 24 of 1941 PA 122.

## IV. CONCLUSIONS OF LAW

Business enterprises are obligated under the Revenue Act and various taxing statutes to file required returns and/or pay any tax due to the State. And it is an undisputed fact that such enterprises must act through individuals, specifically, those actors who are active and in control of the enterprise. Consequently, where a business fails for any reason to file the required returns or to pay the required tax, the responsible corporate officer or officers who fail to fulfill their obligations under these provisions are subject to personal liability for any unpaid tax. MCL 205.27a(5) provides:

> [the] officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the [business enterprises] failure.

MCL 205.27a(5), known as the responsible officer penalty, was intended to allow the Department to pierce the corporate veil to reach persons responsible for the payment of tax to the State. *See Capler v. Department of Treasury***,** unpublished opinion per curiam of the Court of Appeals, issued December 20, 1996 (Docket No. 185421). Liability under the statute is not

premised, however, on an officer's involvement in the financial affairs of the business, even if that involvement is significant; the officer's involvement must be tax specific. *Livingstone v Dep't of Treasury*, 434 Mich 771, 780; 456 NW2d 684 (1990). In other words, so long as the officer has specific authority over the enterprise's tax compliance functions or the expenditures of corporate funds, and effective power to see to it that state taxes are paid, he or she qualifies as a responsible officer. *Id.* Under MCL 205.27a(5), a corporate officer may be found personally liable for the tax deficiencies of the company if the following elements are satisfied: (1) the company was liable for taxes; (2) the company failed to file the required returns or pay the taxes due; and the individual sought to be held personally liable was and officer of the company who:

1. Controlled the making of returns or payments of taxes; or
2. Supervised the making of returns or payments of taxes; or
3. Was responsible for the making of returns or payment of taxes.

See *Livingstone, supra*; *Keith v Dep't of Treasury*, 165 Mich App 105 (1987); *Peterson v Dep't of Treasury*, 145 Mich App (1985); see also Revenue Administrative Bulletin ("RAB") 1989-38.

As a result, the inquiry required by the statute is a search for the officer with ultimate authority over the making of returns or expenditure of funds since such an officer can fairly be said to be responsible for the corporation's failure to pay over its taxes.

*Burden of Proof*

The burden of proof in the primary sense is on Petitioners, *i.e.*, Petitioners bear the burden from beginning to end of the hearing of proving, by a preponderance of the evidence, that the assessments levied against them are erroneous. *Allen v Dep't of Treasury*, 10 MTTR 802, (Docket No. 249514, May 1, 2000). This burden should not be confused with the burden of going forward with the evidence, *i.e.*, the burden of proof in the secondary sense, since the two burdens do not always coincide.

Who, as between Petitioners and Respondent, should be given the job of producing evidence as to the contested issue in this case; tax responsibility . . . . To be sure, neither MCL 205.27a(5), the Tax Tribunal Act, nor our Rules of Practice and Procedure, specifically assign the burden of proof in so-called officer liability cases. Compare MCL 205.737(3) (affirmatively placing the burden of proof on the petitioner in property tax valuation appeals). While the Tribunal may allocate the burden of proof by rule or by ad hoc decision (with sufficient notice), that allocation must be consistent with the legislative scheme being administered. See *Zenith Industrial Corporation v Dep't of Treasury*, 130 Mich App 464, 468; 343 NW2d 495 (1983).

First we note the general proposition that "he who asserts must prove." See *Saari v George C Dates & Associates, Inc*, 311 Mich 624, 628; 19 NW2d 121 (1945). Consistent with this proposition, because the putative responsible officer stands as the petitioner in this Tribunal, it is not unusual that he or she should bear the burden of proof on the issue of his or her tax specific responsibilities within the business enterprise. While the burden of affirmatively showing the nonexistence of a fact, *i.e.*, proving a negative, is disfavored in the law until something has been

offered tending to support it, such as where Respondent makes a *prima facie* showing of tax responsibility, Petitioners' right to appeal the assessments at issue nevertheless requires them to make a negative assertion of tax responsibility. As such, because Petitioners are making the claim, they are charged with the burden of proving it. See *Livingston Shirt Corp v Great Lakes Garment Mfg Co,* 351 Mich 123; 88 NW2d 614 (1958).

Second, it is more efficient that Petitioners should bear the burden of proof. As with tax cases in general, and these types of cases in particular, petitioners are best able to gather and present evidence necessary to determination of their responsibility. See *Zenith Industrial Corporation v Dep't of Treasury,* 130 Mich App 464, 468; 343 NW2d 495 (1983). Petitioners possess a far greater access to evidence and awareness of their roles within G+S' corporate structure and are better equipped to demonstrate that their functions do not satisfy the imposition of liability than Respondent. See., e.g., *Kellog Co v Dep't of Treasury,* 204 Mich App 489, 493; 516 NW2d 108 (1994) (taxpayer, in a books and records case, has the burden of demonstrating that the tax assessment is erroneous); accord *Kostyu v Dep't of Treasury,* 170 Mich App 123, 130; 427 NW2d 566 (1988).

Finally, Section 27a(5) is a form of transferee liability, *i.e.,* a method of imposing tax liability on a person other than the taxpayer who is actually liable for the tax. The Legislature enacted this provision in order to collect taxes due the state by permitting the Department to cut through the legal form to reach those office holders responsible for a business entity's failure to pay the taxes that are owed. It is a tool granted by the Legislature and used by the Department to properly administer and enforce the several tax laws of this state. The legislature further provided that the liability imposed under Section 27a(5) "may be assessed and collected under the related sections of this act." MCL 205.27a(5) (last sentence). Nothing in this provision reflects the Legislative intent to alter the party who bears the burden of proof in cases arising under this section from those cases arising under other provisions of the Revenue Act or the state's substantive tax laws in general. Consistent with legislative scheme, it must be recognized that the cases are legion in which the Tribunal has supported the Department's use of this statute as a means to obtain taxes that would otherwise go unpaid and appropriately placed the burden of proof in cases arising under MCL 205.27a(5) with the taxpayer. See *Allen v Dep't of Treasury,* 10 MTTR 802, 807 (Docket No. 249514, May 1, 2000) (thoroughly discussing the burden of proof and declining to follow the reasoning of the Court of Appeals in *Cracchiolo v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued August 6, 1999 (Docket No. 208042), lv den 462 Mich 903; 613 NW2d 723 (2000); *Hance v Dep't of Treasury*, 20 MTTR 475 (Docket No. 35040, January 9, 2012); *Regester v Dep't of Treasury*, 22 MTTR 393 (Docket No. 379034, June 22, 2011); *Heinz v Dep't of Treasury*, 12 MTTR 273 (Docket No. 286501, June 18, 2003); *Dore v Dep't of Treasury,* 11 MTTR 381 (Docket Nos. 239900 & 26663, November 20, 2001); *MacFarlane v Dep't of Treasury,* 11 MTTR 111 (Docket No. 263705, March 22, 2001); *Rogers v Dep't of Treasury*, 11 MTTR 334 (Docket No. 254920, 2001); *Drake v Dep't of Treasury*, 9 MTTR 51 (Docket No. 204601, December 8, 1995); *Gibb & Sertich v Dep't of Treasury*, 7 MTTR 843 (Docket Nos. 149191, 149192, & 181563, October 1, 1993); *Wasserman v Dep't of Treasury,* 4 MTTR 658 (Docket No. 97351, January 28, 1987). As such, resting the burden of proof on Petitioners is within the settled expectations of the parties. (We are aware, however, of one case from the Court of Appeals that states otherwise, see *Cracchiolo v Dep't of Treasury,*

unpublished opinion per curiam of the Court of Appeals, issued August 6, 1999 (Docket No. 208042), lv den 462 Mich 903; 613 NW2d 723 (2000). That authority, however, is not binding, see MCR 7.215(C)(1).) Accordingly, Petitioners have the burden to prove that they are not corporate officers, or that they were corporate officers without control over or responsibility for making returns or tax payments (*i.e.*, that they did not have tax-related responsibility). *Regester v Dep't of Treasury*, *supra*.

*Prima Facie Evidence - Presumption*

The individual's status as an officer, coupled with his or her signature on various documents, returns, or remittances, provides the Department with a sufficient inference that the individual possessed the level of responsibility contemplated by the statute. See, e.g., RAB 1989-38. To further the legislative purpose, the statute creates a presumption in favor of the Department which attaches to its determination where it produces *prima facie* evidence ["Prima facie evidence" is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Black's Law Dictionary (8th ed.), p 598.] of responsibility, such as corporate returns or tax payments bearing the officer's signature. MCL 205.27a(5). This presumption is not arbitrary, but instead reflects common experience that an officer's signature on a return or remittance indicates that he or she held final authority over the return and/or the payment of taxes. In this case, Respondent presented such evidence as to both Petitioners. However, while Respondent's assessments may initially be entitled to deference and presumed valid on the basis of its *prima facie* evidence of responsibility, MCL 205.27a(5) clearly does not make an officer who signed returns and/or remittances of tax automatically and conclusively responsible for his or her employer's failure to file or pay. The presumption created by the statute is *rebuttable* and may be overcome.[2] In the absence of contravening evidence, however, the presumption is sufficient to establish liability on Petitioners.

In order to rebut this presumption, Petitioners must go forward with satisfactory and competent evidence tending to show that either or both did not possess the requisite tax specific control, supervision, and responsibility and, as a result, Respondent's assignment of responsibility against them is incorrect. See *Heinz v Dep't of Treasury*, 12 MTTR 273 (Docket No. 286501, June 18, 2003). In rebutting the presumption, however, Petitioners do not necessarily sustain their burden, in the primary sense, of proving the assessment erroneous. Petitioners must still show by a preponderance of evidence over whatever evidence Respondent may produce that they were not the responsible tax officers of G+S. Thus Petitioners do not "win" by merely rebutting the presumption of responsibility; each must also sustain his own burden of proof.[3]

[2] The presumption is not evidence itself, but merely a procedural device that shifts the burden of going forward with the evidence to the taxpayer. It does not, however, shift the burden of persuasion to Respondent. See, e.g., Widmayer v Leonard, 422 Mich 280, 289; 373 NW2d 538 (1985).

[3] Even where evidence contrary to the presumption is introduced, and thus the presumption "disappears," the inference from the presumed fact which flows from the basic facts may still be drawn by the Tribunal. *Widmayer v Leonard*, 422 Mich at 294. It is the inference and not the presumption that must be weighed against the rebutting evidence presented by Petitioners. *Id*.

*Responsible Officer*

Responsibility is generally considered to be a matter of status, duty, or authority. In order to determine whether an individual is a responsible officer, the Tribunal must look beyond formal titles and mechanical functions to search for the person or persons with ultimate authority to expend funds. More than one person within the corporation, however, can be "responsible." See *Fortescue v Dep't of Treasury*, 10 MTTR 679 (Docket No. 243194, April 14, 1999). In other words, it is not necessary that an individual have the final word as to which creditors should be paid in order to be subject to liability under MCL 205.27a(5). Rather, it is sufficient that the person have significant control over the disbursement of funds in payment of state taxes. The inquiry is necessarily fact intensive.

Here, Petitioner Eggers held the titles of Secretary and Treasurer and Petitioner Beermann held the titles of Vice President, and subsequently, President. The fact that a person is a corporate officer alone, however, is insufficient to hold a person responsible for the failure to pay taxes. And while the Tribunal recognizes that each Petitioner played an important role in the operations of the company and that their individual roles may be sufficient to find either or both of them responsible, it cannot be said that either was the single, most important individual in G+S' affairs. That was Mr. Schiele, the CEO, who exercised an iron grip on the operations of the company. Without his status, the Tribunal would no doubt be inclined to hold either Petitioner liable, but his status, by itself, is not determinative.

Petitioners' individual duties provide a clearer picture of whether either or both should be held "responsible." It is undisputed that both Petitioners' duties involved financial matters, including maintaining a record of accounts payable, such as state taxes. Mr. Eggers was the second in command and was involved in coordinating the payment of creditors. He signed some payroll-tax forms. As Secretary and Treasurer, it was his responsibility to ensure that the accounts payable were processed efficiently and accurately before they were presented to Mr. Schiele. He was also tasked, along with Mr. Beermann, with negotiating with the Department. In fulfilling those duties, both Mr. Eggers and Mr. Beermann would have been and were fully knowledgeable that G+S was delinquent in its payment of state taxes. The most telling question in this case, however, is whether either or both had the authority to ensure that payments were directed to Treasury, as opposed to other creditors. The Federal Circuit has explained some of the relevant considerations:

> [A] person's "duty" under MCL 205.27a(5) must be viewed in light of his power to compel or prohibit the allocation of corporate funds. It is a test of substance, not form. Thus, where a person has authority to sign the checks of the corporation . . . or to prevent their issuance by denying a necessary signature . . . or where that person controls the disbursement of the payroll . . . or controls the voting stock of the corporation . . . he will generally be held 'responsible.'" *Godfrey v United States*, 748 F2d 1568, 1576 (Fed Cir 1984).

In this case, check-signing authority will be crucial to consider. See *Bedikian v Dep't of Treasury*, 7 MTTR 399 (Docket No. 104045, July 10, 1991) (listing, among other things, a person's authority to direct payment of taxes.) The overall inquiry is whether Petitioner had "the power to compel or prohibit the allocation of corporate funds." See. e.g. *Sandberg v Wis Dep't of Revenue*, unpublished Decision and Order of the Tax Appeals Commission of the State of Wisconsin issued November 18, 2011 (Docket No. 08-W-143).

While according to the bank signature cards, both Petitioners had check-signing authority on G+S bank accounts, said authority was strictly limited. Petitioners could not issue or prevent the issuance of checks by withholding their signatures. And Mr. Eggers' control over payroll was no greater than whatever check-writing authority he had. For practical purposes, the check-signing authority of both Petitioners was exercised infrequently and fundamentally ministerial. Despite Respondent's argument that Petitioners had full authority to pay creditors, the circumstances indicate otherwise.

In *Hance v Dep't of Treasury*, 20 MTTR 475 (Docket No. 359040, January 9, 2012), Patrick J. Hance was employed by a tool company as a salesman. The owner of that company formed an employee-leasing company and transferred the tool company's employees to the leasing company, including Mr. Hance. Mr. Hance was then appointed as the president of the employee-leasing company. The leasing company failed to pay single business taxes for 1997 through 2003, and the Department assessed Mr. Hance for the unpaid taxes based on his signature on the leasing company's 2000 SBT return and the 1997 through 2004 federal income tax returns.

Although Mr. Hance was found to be the president of the leasing company, his job responsibilities as a salesman for the tool company did not change after he was appointed president. He "did no banking, did not make bank deposits, and did not compute payroll . . ." for the tool company, or the leasing company. *Hance, supra* at 478. Although not formally adopted as a fact, the Tribunal reported that Petitioner admitted that he had authority to sign checks for the tool company but this authority was limited "strictly for signing payroll checks" when no one else was available to sign them. *Hance, supra* at 477. There was no evidence or finding that he signed any checks on behalf of the leasing company in remittance of taxes. The Tribunal found that Mr. Hance signed the 1997, 1998, and 1999 SBT returns, but that someone else had written his name on the 2000, 2001, 2002, and 2003 SBT returns.

The Tribunal canceled the assessment in In *Hance, supra*, concluding that Mr. Hance rebutted the presumption, based on his testimony that he had no duties or responsibilities as president of the leasing company, he was not involved in the formation of the company, and he had no control over any aspect of the company. In *Hance, supra*, the tax returns were prepared by an employee who was a CPA. Similar to Petitioners in this case, Mr. Hance did not supervise the CPA and he had no role in preparing the returns. He signed the returns because the CPA asked him to. The Tribunal held that merely holding the title of "president" was insufficient to impose officer liability under the facts of that case, where the petitioner did not exercise control over the making of the corporation's tax returns or payments of taxes, did not supervise the making of returns or payment of taxes, and was not charged with the responsibility for making the corporation's returns or payment of taxes.

This Tribunal notes that there is case law from other jurisdictions suggesting that a person with check-signing authority will be held responsible even though he is directed by a superior to avoid paying the tax and even though he risks losing his job if he disobeys the instruction. *See Greenberg v United States,* 46 F3d 239, 243-44 (3d Cir1994); *Brounstein v United States,* 979 F2d 952, 955 (3d Cir1992); *Gephart,* 818 F2d at 474-75; *Roth v United States,* 779 F2d 1567, 1572 (11th Cir1986); *Howard v United States,* 711 F2d 729, 734 (5th Cir1983). These cases are distinguishable, however, because they involve litigants who were otherwise responsible persons despite being instructed not to pay.

In *Greenberg,* plaintiff was an officer and minority shareholder in the company who routinely signed payroll and other checks. He also hired and fired employees. Most importantly, the decisions to pay certain creditors were made jointly by Greenberg and the company president. In other words, he possessed and exercised the authority to choose which creditors to pay. The Third Circuit held that the mere fact he was instructed to pay certain creditors by the company president did not exculpate him. *See Greenberg,* 46 F3d at 243-44.

In *Brounstein,* plaintiff routinely signed payroll checks to employees and often signed stock certificates, income-tax returns, and business financial disclosures and held the positions of president and assistant treasurer. The company bylaws vested Brounstein with managerial authority to run the operations of the company. He alleged, however, that he merely "rubber stamped" decisions by a member of the board of directors of the company. The board member held the checks, made all hiring and firing decisions, opened the mail, received incoming funds, and disbursed those funds. Brounstein alleged that the principal directed him not to pay taxes. The Third Circuit nevertheless affirmed a finding of responsibility. The court held that the allegation that Brounstein was acting under orders was irrelevant; he was otherwise responsible. *See Brounstein,* 979 F2d at 955.

In *Gephart,* plaintiff was not a shareholder, director, or officer, but merely a general manager who had ordinary day-to-day administrative responsibilities and who had the authority to sign checks and negotiate with creditors. He signed most of the checks and had the authority to hire and fire office personnel. Most importantly, he had the authority to initially determine which creditors would be paid. Gephart exercised this authority often. The Sixth Circuit held that the plaintiff had significant control over the disbursement of funds despite allegations that the corporate president directed him not to pay. *See Gephart,* 818 F2d at 474-75.

In *Howard,* plaintiff, a director, minority shareholder, treasurer, and vice-president in the company with check-signing authority, was found responsible by the trial court. He routinely paid employees and creditors, including the IRS at one point. The majority shareholder had directed Howard not to pay the IRS. The Fifth Circuit held that he was otherwise responsible despite the fact that he may have been fired had he disobeyed the majority shareholder's instructions:

> The fact that Jennings might well have fired Howard had he disobeyed Jennings' instructions and paid the taxes does not make Howard any less responsible for their payment.... Howard had the status, duty, and authority to pay the taxes owed, and would only have lost that authority after he had paid them. Authority to pay in this context means *effective* power to pay. That Howard had this authority was demonstrated by the fact that he did issue small checks without Jennings' approval on a number of occasions.... Had Jennings fired Howard for paying the taxes, Howard would at least have fulfilled his legal obligations. *Howard,* 711 F2d at 734 (citations omitted).

The plaintiffs in the above-cited cases exercised more authority than Petitioners here. In *Brounstein* and *Howard,* the plaintiffs routinely signed payroll and creditor checks without independent authorization. In *Gephart* and *Greenberg,* plaintiffs clearly had the authority, whether through corporate bylaws or other means, to choose between creditors. The Petitioners here did not exercise either authority. Mr. Schiele alone would decide who would be paid. While the existence of another responsible person would not excuse plaintiff, Mr. Schiele retained such exclusive authority that Petitioners effectively had none when dealing with creditors.

While the evidence presented in this case was sufficient to raise the presumption of responsibility, given the naked authority to sign corporate checks, the appearance of the officer's signature on relevant tax returns, and Petitioners' awareness of the corporation's financial condition and unpaid taxes, Petitioners successfully rebutted that presumption. Here the totality of the evidence does not support a conclusion that either Petitioners may be held liable as responsible corporate officers under MCL 205.27a(5). The sworn testimony of Petitioners and the other witnesses stands un-rebutted by any direct evidence. The evidence as a whole is insufficient to support a conclusion that Petitioner (1) had control over the making of the corporation's tax returns and payments of taxes; or (2) supervised the making of the corporation's tax returns and payments of taxes; or (3) was charged with the responsibility for making the corporation's returns and payments of taxes. Rather, the evidence supports a conclusion that all of the corporate power and authority, including those over the corporation's tax affairs was vested in an individual other than Petitioners. *Oleski v Dep't of Treasury*, 22 MTTR 333 (Docket No. 379020, June 22, 2011); *Vallone v Dep't of Treasury*, ___ MTTR ___ (Docket No. 385120, August 18, 2011). As a result, Petitioners are not liable for the assessments at issue. Therefore, to reflect the foregoing,

## V. JUDGMENT

IT IS ORDERED that Assessments R057083 and R120396 are CANCELLED with regard to Werner Beermann.

IT IS FURTHER ORDERED that Assessments R057083 and R120396 are CANCELLED with regard to Peter Eggers.

This Order resolves all pending claims in this matter and closes this case.

Entered: By: Paul V. McCord